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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 632

RUSSELL W. McDERMOTT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING ON THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION.

For the reasons set out in our petition for a writ of certiorari to the United States Circuit Court of Appeals for the seventh Circuit and upon the grounds therein set forth, we respectfully pray the Court to grant a Re-hearing on said petition and grant the writ of certiorari as therein prayed for.

In support of this petition for a re-hearing we herewith submit a brief appended hereto and by reference made a part of this petition for rehearing.

BRIEF.

The opinion of the Circuit Court of Appeals found in the Record on pages 252 to 258, inclusive, adopts certain arguments of the Government upon which the judgment of the Circuit Court of Appeals is based which are not only unsupported by the evidence in the Record but are definitely contradicted by the clear and convincing proof as shown by the Record.

As a basis for a clear understanding of these points it is necessary to say that Marie Langen Sweeney, a customer of the brokerage firm of Moore, McLean & McDermott, of which the Petitioner McDermott was a member, did trading with the firm under the fictitious name of K. K. Kado and also carried another account with the firm under the name of James Allio.

The reason for carrying two accounts was to enable her to carry one account as a cash account and another account as a margin account. The reason for not using her own name in connection with these accounts had its origin with Mrs. Sweeney herself.

Prior to that time, her husband Allan Sweeney had conducted extensive trading with various brokerage firms, which trading had been conducted under her name and at her risk, and in which amounts aggregating approximately $100,000 of her money had been lost. All of these transactions had been done by her husband Allan Sweeney on his judgment and for which no blame was or could be charged against the petitioner, McDermott. This trading on the part of Allan Sweeney had its origin with the firm of Atkins, Hammel & Gates and later with Thompson & McKinnon and still later with the firm of Moore, McLean & McDermott, but under the direct supervision of a member of the firm other than McDermott. When it came to

the attention of the petitioner McDermott that this trading was going on at such a rapid pace and with such terrific losses, McDermott called Mrs. Sweeney into the office of the firm, informed her of the volume of trading and recommended to her to close the account. (R. 177, 111 to 112, 88.) In the course of this conversation between the Petitioner McDermott and Mrs. Sweeney it was determined to close out the old account which was being conducted by her husband Allan Sweeney and open new accounts for Mrs. Sweeney to be conducted on a more conservative basis and under more experienced guidance, and at the suggestion of Mrs. Sweeney, names other than her own were to be used to designate the accounts. We quote from the testimony of Mrs. Sweeney upon the subject as follows: "Well, one thing, if I do carry on an account I don't want it in my name nor do I wish the transactions or papers to be sent to the home." (R. 99.) This was further elaborated and confirmed by additional testimony of Mrs. Sweeney which is found on pages 7 to 10 in Petitioner's original brief filed in the Circuit Court of Appeals and more fully found in the Record on pages 101, 102, 112, 113, 116, 172. These Record references will show conclusively the knowledge of Mrs. Sweeney of the fact that the K. K. Kado account and the James Allio account were her accounts carried for her use and at her risk and that the same was done with her knowledge and consent and at her request, and the practice of carrying accounts in names other than that of the party in interest, is not only a lawful practice but one that is common with all brokerage houses and has never been condemned or even criticized.

With the above explanation which is borne out by the Record by the evidence adduced by the Government and not in any way contradicted, we now go to the findings of the Circuit Court of Appeals evidently based upon a failure to consider these fundamentals, which findings are

in direct conflict with the facts clearly borne out by the uncontradicted evidences as follows:

1. The finding of the Circuit Court of Appeals that there was a misappropriation of United States Treasury Bond 31022B, par value $10,000, sale value $11,211.12.

The Evidence.

The evidence shows clearly that this bond was acquired by the Defendant, not on April 7, 1939, as stated in the opinion, but in October, 1938, and for the specific purpose to which it was applied at the time of sale, and to support this assertion we refer to the following:

A. The written receipt for the bond signed by Mr. McDermott and given to Mrs. Sweeney is in evidence as Government's Exhibit 518 and Defendant's Exhibit 2, and reads as follows:

> "October, 1938. Mrs. Marie Langen Sweeney. Received $10,000 Tr 3¼-46-44 to be held and used by Mr. McDermott for collateral purposes in account known as Jas. Allio or other he may see fit for trading purposes. This bond to be held in Mr. McDermott's possession and not sold until ordered by me unless otherwise it becomes necessary to do so because of market conditions. Understood Richardson McVey auditors will make up audit periodically as see fit to do so. R. McDermott." (Government's Ex. 518, Defendant's Ex. 2.)

B. Concurrently with the giving of said receipt Mrs. Sweeney gave to the Defendant written authorization relating thereto over her signature which appears in evidence as Defendant's Exhibit 3, reading as follows:

> "October, 1938. R. D. McDermott, 40 N. Penn. Indpl. This is giving you authority to use the 10 M Tr Bond for Trading purposes as you may see fit. Satisfactory to use Jas. Allio or others you may suggest. Also agreed to notify Richardson McVey

C. P. A. when activities start and audit be made periodically. Marie Langen Sweeney." (Defendant's Ex. 3.)

C. Mrs. Sweeney in her testimony states as follows: "I don't know whether the receipt mentioned James Allio or not," and after refreshing her recollection from the receipt she further testified:

> "I know James Allio was mentioned afterwards but I don't recall whether it was mentioned at that time or not." (R. 112, 113.)

The witness Richardson testified that he made an audit of the accounts carried in the names of K. K. Kado, James Allio, Philip Allio, and Russell Faux, and that he furnished a copy of the audit to Mrs. Sweeney and that he later discussed the audit with Mrs. Sweeney. (R. 171.) He then testified as follows:

> "At the time I wrote the transmittal letter I knew these accounts belonged to Mrs. Sweeney. I learned that from Mr. McDermott and had it confirmed by Mrs. Sweeney over the telephone." (R. 172.)

It therefore appears clear that the application of the bond herein described or its proceeds to the James Allio account was strictly in conformity to the purpose for which it was held and did not and could not constitute a misappropriation of the bond or its proceeds.

2. The finding of the Circuit Court of Appeals that there was a misappropriation of United States Treasury Bond 1199-K, face value $5,000.

The Evidence.

The undisputed evidence upon this subject as shown by the testimony of Mrs. Sweeney, the owner of the bond, was as follows:

> "There was some discussion with Mr. McDermott that day about making some investment in Christ

Church bonds. The talk was that the Church bonds would be bought under par and were paying a better rate of interest than the government bonds. McDermott advised me that $4,000 of government bonds would buy $5,000 worth of Church bonds and he recommended this. No decision was reached that day. Something was said about some of my bonds being put in Cecelia McDermott's account.

Q. Was it your suggestion that one of these bonds might be sold and the proceeds kept available to determine whether or not you should purchase these Church bonds?

A. It wasn't my suggestion. It was Mr. McDermott's suggestion. He asked if it would be all right to do it.

Q. Was that agreed to between you and him?

A. Yes, sir." (R. 118.)

She further testified upon this subject as follows:

"For a period then I didn't talk much to Mr. McDermott as he was in Chicago on account of his father's illness. When I couldn't make up my mind what I wanted to do with the bond in Cecelia McDermott's account I said I wished him to purchase a government bond, instead of the Christ Church bonds, and he bought government bonds with it and turned them over to me. That was some time in June, the first time I had been to his office." (R. 119.)

The receipt of Mrs. Sweeney for the substituted bonds was as follows:

"..... 1939: 'Received from Mrs. McDermott the following Treasury 3¼s; 81874D, 4472B, 4473C, 4474D, and 4475E.'

The Court: Does that show where they came from?

The Witness: It says on this receipt: 'These to replace the $5,000 bond sold in Cecelia McDermott's account per my instruction Good Friday.' Signed, 'Marie Langen Sweeney.'" (R. 174.)

Assuming that there was some evidence in the Record to sustain the holding of the Circuit Court of Appeals that the proceeds from the sale of Bond Number 1199K

were used in part to purchase an interest in certain lots in Marion County, Indiana, and in part to pay defendant's indebtedness to another bank at Indianapolis, (a matter about which there was direct conflict in the testimony) there was no conflict whatever in the testimony of Marie Langen Sweeney that the identical amount of actual Treasury bonds and of the same issue was restored to her in kind on the occasion of her first visit to the office of the petitioner, McDermott, after the sale of the original bond.

In the light of the above, what matters it whether the contention of the government is correct that there had been an intervening use of the money to buy real estate and pay personal indebtedness, or the contention of the petitioner is correct that the money had all the time remained in the account of Cecelia McDermott, carried with Moore, McLean, and McDermott.

To still further support the contention that the evidence shows that there was no misappropriation of either of these bonds mentioned in paragraphs one and two we cite Government's Ex. 519, being a communication addressed by Marie Langen Sweeney to Mr. Russell McDermott under date of April 9, 1941 which was nearly two years after the trading had ceased and which reads as follows:

"Indianapolis, Indiana,
April 9, 1941.

Mr. Russell McDermott,
City.

DEAR MR. MCDERMOTT:

Up to the fall of 1938, my husband, Mr. Allen Sweeney, handled my marginal account and incurred such losses that I decided to handle it myself. As Mr. Sweeney had been conducting business with the firm of Moore, McLean, and McDermott, I continued it with you, and gave you the customary power of attorney to act upon my behalf. This was in or

about the month of October, 1938. I did not want the account carried in my name, nor did I want communications and reports to come to my apartment. The account was therefore carried in the name of K. K. Kado, and reports were mailed to K. K. Kado in care of Stationers, Inc., whose place of business is next to that of Moore, McLean and McDermott. It was understood that I should call for such communications at any time that I pleased.

The transactions in the account resulted in a loss. These were due to a continuous declining market, and through no fault, mishandling, or dishonest act on your part. Every transaction was accounted for, and the entire account was audited by Richardson & McVey, of this city, and everything was found straight and satisfactory.

Inasmuch as particular question has been raised relative to the purchase and sale of the United States Treasury Bonds, I wish to assure you that all of my Treasury Bonds which were turned over to you, and all proceeds, have been fully and accurately accounted for. S. E. C. Investigators questioned me closely as to this account. I could not answer their questions fully and satisfactorily for the reason that I did not have all records and receipts with me. Since the time that they questioned me, I have located one receipt for $10,000.00 of Treasury Bonds, given to me by Mr. McDermott in October of 1938, such bonds to be used as collateral on the James Allio account. This account was set up with my knowledge and consent.

I am, and at all times have been, satisfied that I have received every penny that was owing me by you and your firm.

Yours very truly,

Signed MARIE LANGEN SWEENEY."

This letter was written nearly two years after the account of Marie Langen Sweeney had been closed, and sufficient length of time had elapsed to make any discovery of which she might have been ignorant at the time the account was closed. She had been interviewed by the S. E. C., as the letter so states, and she was fully informed

with respect to all of the matters covered by the letter. She had full knowledge of the disposition of the $10,000 Treasury Bond referred to in the opinion of the Circuit Court of Appeals and every fact that is germane to the case was fully known to her.

The introduction of this letter by the government instead of the defendant took away much of its force before the jury, and it was no doubt for this purpose that the government introduced the exhibit, but certainly the fact that it was introduced by the government instead of the defendant should not detract from its force and effectiveness before this court.

3. The holding of the Circuit Court of Appeals that the James Allio account was under-margined as charged in Counts 10 to 14, inclusive, of the indictment, and particularly Count 12 thereof.

The Evidence.

As stated in our original Petition for Writ of Certiorari on page 9, this holding is based upon two errors or oversights on the part of the Circuit Court of Appeals to take into account certain vital facts that are omitted in the computation appearing in the opinion as follows: By Government's Ex. 11-K it is shown that on the 31st day of March, 1939 a deposit to the account of James Allio was made in the amount of $8,000 which deposit is entirely ignored in the computation set out in the opinion and in addition thereto the opinion entirely ignores the fact that United States Treasury Bond 31022B in the face amount of $10,000 but of the actual cash value of $11,211.12 was at all times held for the protection of the account. If these two facts, which the Circuit Court of Appeals' opinion ignores are taken into account it is perfectly clear that there was no time at which the

account was ever under-margined below the requirements of the regulations of the Board of Governors of the Federal Reserve.

It is true that government's witness Holland stated in his oral testimony over and over again that the James Allio account was frequently "under water" (a term used by the witness as meaning under-margined) but when confronted by actual facts and figures his testimony upon the subject boiled down to this:

> "Q. Now you talked about this account being 'under water' (a term used by the witness as meaning under-margined) constantly, and I think you said at one time it got up to a point where it was eight thousand dollars under water, did you not?
>
> A. I think I said a maximum of eighty-five hundred.
>
> Q. Eight five hundred dollars. Now, assuming that this ten thousand dollar bond, 31022B, that was subsequently sold for in excess of eleven thousand dollars, had been in the Indianapolis guaranteeing that account, from October until April 8th, when it was sold, that condition about the account being 'under water' would not have existed? Isn't that correct?
>
> A. That is true." (R. 89.)

4. The holding of the Circuit Court of Appeals that trading in the James Allio account was by virtue of a system of buying securities and selling the same securities to pay for their purchase and concealing this by an exchange of checks in substantially equal sums. A witness described this practice as "matching checks", "check kiting" and "free riding".

The Evidence.

It is a fact that running all through the testimony of government's witness Holland is a train of instances characterized by the witness as the "matching of checks" and sometimes referred to as "check kiting" and numerous

instances are recited by the witness where checks of similar or nearly similar amounts were given by James Allio to the firm and by the firm to Allio on or near the same day. These instances are described on pages 54, 55, 56, 59, 61, 64, 65, 89 and 96 of the Record, but in Petitioner's original brief to the Circuit Court of Appeals, beginning on page 17 and ending on page 21 of said brief, every instance characterized by the witness Holland as constituting a transaction of "matching checks" or "kiting checks" is analyzed in detail from the exhibits introduced by the government, and every check payable from the firm to the Allio account is shown to represent the net sale price of a security actually sold out of the Allio account and every check payable from Allio to the firm is shown to represent the actual purchase price of a security purchased into the account.

We have analyzed each one of these transactions from the original exhibits from pages 17 to 21 inclusive of our former brief, and we say without fear of successful contradiction that there is not a single instance in the Record where there was any "check matching" or "check kiting" within the obnoxious meaning of the law. It is our understanding that Petitioner's original brief in the Circuit Court of Appeals has been certified to this Court and is available for the consideration of this Court and we most earnestly urge and request this Court to refer to said brief on pages 17 to 21 for further enlightenment upon this subject. We also call attention to the direct testimony of the witness Holland, upon whose testimony the whole fabric of "check matching" and "check kiting" is builded, as follows:

> "The defendant did not ever give any one a check when there wasn't sufficient money in the bank to meet it. If there was any "check matching" in the Allio account it was done by James Allio and not by the defendant." (R. 89.)

Conclusion.

We are not unmindful of the hesitancy of Courts to grant rehearings, nor are we unmindful of the reluctance to grant writs of certiorari where questions of public interest are not involved, but we do feel that where the life or liberty of a citizen of the United States is at stake and the absence of any criminal intent is as clear as it is in the case at bar, this Court will not be bound in the exercise of its discretionary right by any limitation, but will do justice where justice has failed in the trial Court, and we earnestly pray that a rehearing be granted herein and that the Petition for the Writ of Certiorari be granted as prayed for.

Respectfully submitted,

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